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Crown v. Marion National Bank, recently decided by the Supreme Court of the United States, involved important questions concerning the construction of sections of the National Banking Law, regulating the rate of interest to be charged by national banks. One of the sections of that law provides that national banks may charge on any loan or discount made, or upon any note, bill of exchange or other evidence of debt, interest at the rate allowed by the laws of the State or territory or district where the bank is located, and no more, except that where by the laws of any State a different rate is limited for banks of issue organized under State laws, the rate so limited shall be allowed for associations organized or existing in such State. Another section provides that the taking or charging a rate of interest greater than that allowed, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed upon, and that in case the greater rate of interest has been paid the person by whom it has been paid or his legal representatives may recover back twice the amount of the interest thus paid from the bank taking the same.

In construing these provisions the court said that interest included in a renewal note or evidenced by a separate note does not cease thereby to be interest and become principal so as to escape the forfeiture provided for knowingly taking or charging an illegal rate of interest. If, the court said, the bank sues upon the note, bill or other evidence of debt held by it, the debtor may insist that the entire interest, legal and usurious, included in written obligations and agreed to be paid, but which has not actually been paid, shall be either credited upon the note or eliminated from it and judgment given only for the original principal debt, with interest at the legal rate from the commencement of the suit.

The forfeiture declared by the statute, the court held, is not waived by giving a renewal note in which is included the usurious interest, and no matter how many renewals may be made, if the bank has charged a greater rate of interest than the law allows, it must, if the forfeiture clause of the statute be relied on and the matter is thus brought to the attention of the court, lose the entire interest which the note carries or which has been agreed to be paid. By no other construction of the statute, the court says, can effect be given to the clause forfeiting the entire interest which the note, bill or other evidence of debt carries, or which was agreed to be paid, but which has not actually been paid.

Some attention was devoted by the court to the contention that within the meaning of the statute interest is "paid" when it is included in a renewal note, so that when suit is brought upon the last note calling for interest from its date only the interest accruing on the apparent principal of that note is subject to forfeiture. Judge Harlan, who read the opinion, said, however, that the statute could not be so construed, for if interest were paid by simply including it in a renewal note it would follow that as soon as the usurious interest "agreed to be paid" was included in a renewal note the borrower or obligor could sue the lender or obligee and "recover back twice the amount of the interest thus paid," when he had not, in fact, paid the debt nor any part of the interest as such. This, Justice Harlan said, could not be a sound interpretation of the statute; the words "in case the greater rate of interest has been paid" refer to interest actually paid as distinguished from interest included in the note and "agreed to be paid." If, for example, one executes his note to a national bank for a named sum as evidence of a loan to him of that amount, to be paid in one year at ten per cent. interest, such a rate of interest being illegal, and if renewal notes are executed each year for five years without any money being in fact paid by the borrower—each renewal note including past interest, legal and usurious—the sum included in the last note in excess of the sum originally loaned would be interest which that note carried or which was agreed to be paid, and not as to any part of it interest paid. On the other hand, if the note when sued on includes usurious interest, or interest upon usurious interest agreed to be paid, the holder may elect to remit such interest, and it cannot then be said that usurious interest was paid to him. The construction of the law given in the decision is of a nature to render it difficult to evade its provisions in so far as they are intended to prevent usury.

NOTES OF IMPORTANT DECISIONS.

EVIDENCE — AGENCY — DECLARATIONS OF AGENT.—In Newell v. Chipman, 49 N. E. Rep. 631, decided by the Supreme Judicial Court of Massachusetts, it was held, conceding that the fact of agency cannot be shown by the declarations of an agent, evidence is nevertheless competent to show that, in what the agent said and did, he purported to act for defendant, and not for some one else. The court said that, "there were two aspects in which this case may have gone to the jury. One was that the defendant herself ordered the stone of the plaintiff, and promised to pay him therefor. The other was that she contracted for it through Taylor & Gibson. In the latter aspect of the case, it was necessary to show that Taylor & Gibson were her duly authorized agents. This, of course, could not be shown by their declarations to that effect. But, as one step in establishing the defendant's liability in this aspect of the case, it was necessary to show that in what they said and did they purported to act for her, and not for some one else. And for this purpose what they said and did was competent. Such testimony has been received elsewhere without objection. Riley v. Packington, L. R. 2 C. P. 536. The testimony thus introduced was not the only evidence relating to the question of agency. There was testimony tending to show that Taylor drew the plans and specifications; that he supervised the preparations for the construction of the foundation, and also the work in the erection of the house on the defendant's premises; that he went with her to induce the plaintiff to figure on the stone for the foundation; that he was afterwards sent to him by her concerning the stone for the foundation; and that the paper which was signed by the plaintiff, and which was procured by Taylor, through Gibson, after Taylor had been sent to the plaintiff by the defendant, was considered by the defendant, Taylor, and Gibson, when the contract between the defendant and Gibson was signed. There was also testimony tending to show that the defendant personally urged the plaintiff to send the stone, and promised to pay for it, after the contract had been signed between her and Gibson. We think that it would not have been an unwarrantable inference on the part of the jury, from this testimony, that Taylor had authority to act for the defendant in contracting with the plaintiff for the stone."

INJUNCTION — BREACH OF CONTRACT — SPECIFIC PERFORMANCE.—The Supreme Court of Illinois holds in Welty v. Jacobs, 49 N. E. Rep. 723, that equity will not restrain the breach of a contract to furnish for a certain period the use of a theater, cleaned, lighted and heated, together with stock, scenery and equipments, and to provide stage hands, carpenters, house programmes, licenses, billboards, stage furniture and properties, made in consideration of plaintiff's agreement to furnish a company to perform a certain play, or enjoin the use and occupation during said period by any other company. It was further held that a contract to furnish a theater fully supplied with stage hands and employees will not be specifically enforced, where the other party to the contract could not be compelled to carry out his agreement, and furnish a properly equipped company to produce a certain drama at such theater. The court said in part: "But it is urged that courts of equity will by injunction restrain the violation of contracts of this character in many cases where they cannot decree specific performance, and the following among other cases are referred to: Western Union Tel. Co. v. Union Pac. Ry. Co., 3 Fed. Rep. 423-429; Wells, Fargo & Co. v. Oregon R. & Nav. Co., 15 Fed. Rep. 561, and 18 Fed. Rep. 517; Wells, Fargo & Co. v. Northern Pac. R. Co., 23 Fed. Rep. 469. Without determining whether there may not be exceptional cases not falling within the general rule, we think the rule is as stated in Chicago, M. G. L. & F. Co. v. Town of Lake, 130 Ill. 42, 22 N. E. Rep. 616, and the authorities there quoted. It was there said (page 60, 130 Ill., and page 619, 22 N. E. Rep.): 'The bill of complaint in this case, though not strictly a bill for the specific performance of a contract, is in substance a bill of that kind. In 3 Pom. Eq. Jur. sec. 1341, it is said: "An injunction restraining the breach of a contract is a negative specific enforcement of that contract. The jurisdiction of equity to grant such injunction is substantially coincident with its jurisdiction to compel a specific performance. Both are governed by the same doctrine and rules. It may be stated, as a general proposition, that whenever the contract is one of a class which will be affirmatively specifically enforced, a court of equity will restrain its breach by injunction, if this is the only practical mode of enforcement which its terms permit." It is plain that, as a general rule, to enjoin one from doing something in violation of his contract is an indirect mode of enforcing the affirmative provisions of such contract, although such an injunction may often fall short of accomplishing its object. It is obvious, from what has been said and from the authorities, that to enjoin appellee Jacobs, as prayed in the bill, from refusing to furnish the usual and necessary light, heat, music, regular stage hands, stage carpenter, ushers, equipments, etc., provided for in the contract, would be the same, in substance, as to command him to furnish them, and without them the use of the theater building would seem to be of little use. It is practically conceded by counsel for appellant that this part of the contract could not be specifically enforced as prayed, or otherwise, in equity; but it is contended that this part of the contract is merely incidental to the more important part of it, which was the right to occupy and use the theater and its furnishings, and give therein the performances provided for, and to exclude from a like occupation and use the other appellee, Newell, and that the injunction was proper for that purpose. This would have

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been an indirect method of enforcing a part performance of the contract, and courts will not enforce specific performance of particular stipulations separated from the rest of the contract, where they do not clearly stand by themselves, unaffected by other provisions. Baldwin v. Fletcher, 48 Mich. 604, 12 N. W. Rep. 873. Even if such a decree might have been sustained, we are satisfied the sound legal discretion of the court was not violated in refusing it, or in dissolving the injunction after it was granted. Appellant's remedy, if any he had, was at law."

ANIMALS—DESTRUCTION OF DISEASED ANIMALS.—In Houston v. State, decided by the Supreme Court of Wisconsin, it was held that where certain cattle were destroyed by authority of the State veterinarian, under color of Laws 1885, ch. 467, as amended by Laws 1887, ch. 76, providing for the destruction of such animals when affected with a "contagious or infectious disease of malignant or very fatal nature," none of which cattle were at the time they were so condemned affected with any disease whatever, such destruction thereof was without authority of law and tortious, and that Rev. St. § 3200, authorizing any person aggrieved by the refusal of the legislature to allow any just claim against the State to bring an action against the State, by filing with the clerk of the supreme court a complaint setting forth the nature of such claim (enacted in pursuance of Const. art. 4, § 27, providing that the "legislature shall direct by law in what manner and in what courts suits may be brought against the State"), does not include a demand based on the alleged tortious acts of officers of the State; and therefore an action cannot be maintained against the State for damages for the wrongful and tortious destruction of plaintiff's property by its officers under color of police regulations duly passed by the legislature. The court says: "It is fairly established, by adjudications too numerous to mention, that a State may, in the proper exercise of its police power, authorize the destruction of such property as has become a public nuisance, or has an unlawful existence, or is noxious to the public health, public morals, or public safety, without compensation, notwithstanding the prohibition in section 1, art. 14, of the amendments to the constitution of the United States. Bittenhaus v. Johnston (Wis.), 66 N. W. Rep. 805; Mugler v. State of Kansas, 123 U. S. 623, 8 Sup. Ct. Rep. 273; Kidd v. Pearson, 128 U. S. 1, 9 Sup. Ct. Rep. 6; Lawton v. Steele, 119 N. Y. 226, 23 N. E. Rep. 878, affirmed 152 U. S. 133, 14 Sup. Ct. Rep. 499. The question of such power, however, does not here arise. The demurrer admits the facts alleged in the complaint. The complaint alleges that none of the cattle destroyed were affected with any disease at the time they were condemned, but were each and all entirely free from any disease, and healthy, strong and vigorous animals. The statute only authorized the destruction of animals in case they were affected with some 'contagious or infectious disease of malignant or very fatal nature.' Sanb. & B. Ann. St. § 1492a. Unless the animals were so diseased, in fact, their slaughter was without authority of law, and hence tortious. Pearson v. Zehr, 138 Ill. 48, 29 N. E. Rep. 854; Miller v. Horton, 152 Mass. 540, 26 N. E. Rep. 100. The question recurs whether this suit can be maintained against the State for the injury sustained for such alleged unlawful destruction. Prior to the eleventh amendment to the constitution of the United States, it was held, in effect, that a State might be sued in the Supreme Court of the United States by an individual citizen of another State. Chisholm v. Georgia, 2 Dall. 419. But since that amendment, it is believed, the courts have uniformly held that no State could be sued in any court without its express consent. Louisiana v. Jumel, 107 U. S. 711, 2 Sup. Ct. Rep. 128; Chicago, M. & St. P. Ry. Co. v. State, 53 Wis. 509, 10 N. W. Rep. 560. The same is true of the United States. Schillinger v. U. S., 155 U. S. 163, 15 Sup. Ct. Rep. 85; U. S. v. North Carolina, 136 U. S. 211, 10 Sup. Ct. Rep. 920; State v. Hill, 54 Ala. 67; Clark v. State, 7 Cold. 306; Railroad Co. v. Alabama, 101 U. S. 832. Our constitution expressly provides that 'the legislature shall direct by law in what manner and in what courts suits may be brought against the State.' Const. Wis. art. 4, § 27. In pursuance of that provision, the legislature at an early day provided that 'it shall be competent for any person, deeming himself aggrieved by the refusal of the legislature to allow any just claim against the State, to commence an action against the State, by filing a complaint, setting forth fully and particularly the nature of such claim, with the clerk of the supreme court, either in term time or in vacation.' Rev. St. § 3200. This section only relates to claims which, if allowed, render the State a debtor to the claimant. Chicago, M. & St. P. Ry. v. State, 53 Wis. 509, 10 N. W. Rep. 560; Clodfelter v. State, 86 N. Car. 51; State v. Hill, *supra*. This statute does not include a demand based upon the unlawful and tortious acts of officers or agents of the State. Hill v. U. S., 149 U. S. 593, 13 Sup. Ct. Rep. 1011. Thus, in Massachusetts, it is held that a similar statute did 'not extend to a claim for damages resulting from the misfeasance or negligence of its officers and agents in performing their duties.' Murdock Parlor-Grate Co. v. Com., 152 Mass. 28, 24 N. E. Rep. 854. The same construction of the word 'claim' has been applied by this court to demands against municipalities. Kelley v. City of Madison, 43 Wis. 638; Bradley v. City of Eau Claire, 56 Wis. 168, 14 N. W. Rep. 10; Jung v. City of Stevens Point, 74 Wis. 547, 43 N. W. Rep. 513; Sommers v. City of Marshfield, 90 Wis. 59, 62 N. W. Rep. 937. The law is well established that neither the State nor the United States is answerable in damages to an individual for an injury resulting from the alleged misconduct or negligence or tortious acts of its officers or agents. Gibbons v. U. S., 8 Wall. 269; Langford v. U. S., 101 U. S. 341; German Bank of Memphis v. U. S., 148 U. S. 573, 13

Sup. Ct. Rep. 702; Clark v. State, 7 Cold. 306. It follows from what has been said that this action for the alleged unlawful and tortious action of the officers and agents of the State cannot be maintained against the State, for the simple reason that the legislature has never authorized an action in this court for such misconduct."

PARDONS.

Some months since a case arose in one of the circuit courts of Oregon upon the following state of facts: One Betz had been convicted of a felony, had been sentenced to a term in the Oregon penitentiary, had appealed to the supreme court, and was confined in the county jail, under a stay of execution, pending a hearing of the appeal. At this time an application was made to the governor of Oregon for a warrant of extradition to Illinois, in order that Betz might be tried there upon a charge of murder averred to have been committed in Chicago. The Oregon executive granted this warrant to the agent of the State of Illinois, and to insure his deportation issued a full pardon of the offense against the laws of Oregon. Betz, however, refused to accept the proffered favor, refused to receive the pardon, which was deposited with the sheriff of the county where he was confined, and sued out a writ of *habeas corpus* before a circuit judge, thereby attempting to resist the claim of the Illinois officers to a right to remove him. After a hearing, the court held that this pardon could not be forced upon him *in invitum;* that the Illinois officials had no right to his person, prior to the expiration of his term of service; that a pardon was a grant, to the validity of which delivery and acceptance were essential, and remanded the petitioner to the custody of the sheriff. This decision excited some discussion at the time; it is believed that it was strictly in accordance with the prescriptions of law, and that any other determination of the question would have been without warrant, either in reason or authority. An examination of the nature, scope and effect of a pardon may prove not without interest. What is a pardon? A pardon is an act of grace, proceeding from the power intrusted with the execution of the laws, which exempts the individual on whom it is bestowed from the punishment the law inflicts for a crime he has committed. Pardon is to be distinguished from amnesty. The former applies only to the individual, releases him from the punishment fixed by law for his specific offense, but does not affect the criminality of the same or similar acts, when performed by other persons, or repeated by the same person. The latter term denotes an act of grace extended by the government to all persons who may come within its terms, and which obliterates the criminality of past acts done, and declares that they shall not be treated as punishable.[1] A pardon is a deed of grant, and like any other deed of grant it must be pleaded. This was the rule at common law.[2] There is a *dictum* in Jenkins, p. 169, case 62, cited in U. S. v. Wilson, *infra*, to the effect that it need not be pleaded because the king has an interest in the life of a subject, but this view is unsupported by authority. Upon the other hand, a pardon by act of parliament, such as might be granted at common law, need not be pleaded, because the courts would judicially notice the laws so passed.[3] It is not perceived, however, that a pardon by legislative act would differ in any of its essential features from one resulting from executive action. As a pardon is a grant, so it is a deed, to the validity of which delivery and acceptance are essential. Like all grants, it is to be construed in favor of the grantee; and its terms are to be strictly construed.[4] The doctrine of pardon in the United States is essentially the same as that of England, being derived from it. The power has always existed as a prerogative of the English crown. It has grown with the growth of the common law. While the power has at times been exercised by parliament, and limited and controlled by that body, in general it has been exercised by the king, and left entirely to his judgment and discretion. In the United States, by the constitution, except in cases of impeachment, it is conferred upon the president. So, in the States, it is left to the executives, subject to certain limitations.[5] Like a contract, it is not a prerequisite that particular words be

[1] Black's Law Dict., tit. Pardon.

[2] Hawkins' P. C., b. 2, ch. 37, § 64; Comyns' Dig., tit. Pardon H.; 4 Bl. Com., p. 337; this author also stating that it may be pleaded in arrest of judgment.

[3] 4 Bl. Com., p. 376.

[4] State v. Shelton, 65 N. Car. 294, 17 Am. & Eng. Enc. of Law, 330.

[5] 17 Am. & Eng. Enc. of Law, 318-319.

employed, so that the intent be manifest. It is not necessary that the word "pardon" be employed; therefore a writing by the president under the seal of the United States, directing the discharge of a person sentenced to imprisonment for robbing the mail, was held to be a pardon.[6] It will be observed that the term "grant" has been several times employed in the foregoing statement of the rules of law invoked to aid us in the elucidation of this question. What is a grant? An act evidenced by letters-patent under the great seal, granting something from the king to a subject.[7] A transfer by deed of that which cannot be passed by livery.[8] A pardon may be granted on condition precedent or subsequent, and the party remains liable to punishment, if the condition is not performed.[9] The only limitation upon the conditions which may be imposed, is that they must not be impossible, immoral or illegal. Any punishment recognized by the statute, or the common law enforced in the forum, may be substituted for that punishment inflicted in the given case.[10] A conditional pardon is one with a condition attached, or one upon any terms that the pardoning power pleases to affix. This is recognized by the English books.[11] The grant of a conditional pardon simply implies a contract between the sovereign power and the criminal, that the release may be upon the conditions imposed and accepted by the criminal.[12] A conditional pardon differs materially from a mere commutation of sentence. The former being a grant, there must inhere in it all of the appropriate elements of such contract; but the latter is the substitution of a less for a greater punishment by authority of law, and may be imposed upon the convict without his acceptance, and against his consent.[13] Now, if a pardon, that is, the ordinary executive act of clemency of which we have been treating, possess these qualities, its close analogy to the ordinary deed of gift is at once apparent. Delivery is an essential. But "delivery is not complete without an acceptance."[14] "The delivery of a written contract is any act, whereby the party delivering it relinquishes his power over the writing, * * * with the expressed or implied intent that it shall operate as a contract; the other party, in fact, or in presumption of law, consenting thereto."[15] "Delivery and acceptance are complete when the grantor has parted with his entire control or dominion over the instrument, with the intention that it shall pass to the grantee, and the latter assents to it either by himself or agent."[16] It is then apparent from the very nature of a pardon, having due regard to the rules applicable to all like contracts, both in England and wherever the common law prevails, that no man can be coerced, against his consent, into an acceptance of the gift. Under many circumstances acceptance may indeed be presumed, especially of that which is apparently for one's benefit. A reception of a pardon may, of course, be by an agent, as in the case of any gift; and the warden of a penitentiary may be deemed, in the absence of opposing proof, the agent of the prisoner. So we find some conflict in the books as to the questions of the necessity of pleading affirmatively; of how the matter shall be averred; as to the stage in the proceedings when the matter shall be brought before the court; what the court will judicially notice; the burden of proof, and similar matters. The underlying principles, however, have not been departed from; and the views of the courts accord well with the dictates of common sense. A pardon might be granted upon conditions so onerous that its rejection would be far preferable to an acceptance. It might be granted and forced upon one who would rather prosecute his writ of error to secure a reversal of the judgmen of conviction. The case referred to at the beginning of this article illustrates this phase of the subject.

In the year 1833, this question came before the Supreme Court of the United States, in a

[6] Hoffman v. Coster, 2 Whart. 453; Jones v. Harris, 1 Strobh. 160.

[7] Cruise Dig., tit. 33, 34.

[8] Williams on R. R., pp. 147-9.

[9] 2 Hawk. P. C., ch. 37, § 45; 3 Thomas' Co. Litt. 569, 615 N. M., and authorities; Patrick Madden's Case, 1 Leach's Cas. 220, 263; People v. James, 2 Caine's, 57; Radcliff's Case, Fost. Cr. Law, 41.

[10] Lee v. Murphy, 22 Gratt. 789, 12 Am. Rep. 563.

[11] 1 Chitty's Cr. Law, 714; 2 Hawk. P. C., tit. Pardon; 1 Leach's Cr. Law, 223, 393; *In re* Parker, 5 M. & W. 32.

[12] Lee v. Murphy, *supra;* Perkins v. Stevens, 24 Pick. 278; People v. Potter, 1 Park. Cr. Reps. 47, 53; 1 Bish. Cr. Law, 760; *Ex parte* Wells, 18 How. 307; Com. v. Fowler, 4 Call. 35, *contra.*

[13] Lee v. Murphy, *supra.*

[14] Marshall, C. J., in U. S. v. Wilson, *infra.*

[15] Bish. Conts., § 350, and cases cited.

[16] Rosson v. State, 23 Tex. App. 287; Hunnicutt v State, 18 Tex. App. 498.

case where a prisoner convicted of robbing the mails and condemned to death, refused to plead his pardon or in any manner avail of it. The opinion by Marshall, C. J., may be considered the leading case in the United States, and, so far as the writer has discovered, has been constantly followed. After referring to the powers conferred by the constitution upon the president, to the immemorial exercise of such powers by the English nation, to the principles respecting the operation and effect of a pardon found in the English books, Judge Marshall proceeds: "A pardon is a deed, to the validity of which delivery is essential, and delivery is not complete without acceptance. It may then be rejected by the person to whom it is tendered; and, if it be rejected, we have discovered no power in a court to force it on him. It may be supposed, that no being condemned to death would reject a pardon; but the rule must be the same in capital cases as in misdemeanors. A pardon may be conditional; and the condition may be more objectionable than the punishment inflicted by the judgment."[17] It might be that in a capital case where the prisoner refused a pardon, the executive could prevent execution of the sentence; but this does not affect the judicial question we are discussing. In Virginia, the court, recognizing the distinction between a pardon and a commutation of sentence, say: "It is to be borne in mind that there is a material distinction between a conditional pardon and a mere commutation of punishment. A conditional pardon is a grant, to the validity of which acceptance is essential." It may be rejected by the convict; and, if rejected, there is no power to force it upon him."[18] In Pennsylvania, during the civil war, a pardon had been granted by Governor Curtin, which was procured through a forged application or request from the war department of the United States government. The pardon had been delivered to the warden of the penitentiary for the prisoner. Upon discovery of the fraud committed, and before the prisoner's discharge, it was recalled and annulled by the executive authority. Upon *habeas corpus* this act of the governor was sustained. The opinion explicitly holds a pardon to be a grant or charter requiring delivery and acceptance; concedes that in the absence of proof *prima facie*, a delivery to the warden of the penitentiary would suffice, but states that this presumption may be overcome. In this case the fraud committed, would of itself authorize the recall of the act of grace. But the point of the case is its recognition of the nature and attributes of the grant. It is not to be differentiated from any grant or charter; hence acceptance is essential."[19] "It is not denied," says Woodruff, United States Circuit Judge, "that when a writ of error lies from a judgment, or appeal, the prisoner cannot, by a pardon granted, be prevented from prosecuting the same to obtain a reversal for error. He may prefer to have the judgment set aside and vacated or reversed. The opposite of this would be a monstrous doctrine."[20] "Delivery and acceptance of a pardon are essential to render it effectual. The same rules which govern the delivery and acceptance of deeds govern in the case of a pardon." This was the language of the Texas Court of Appeals in a case very similar to the one cited from Pennsylvania.[21] "Pardon to be complete, must, in contemplation of law, be delivered and accepted. The principles applicable to the delivery of a pardon and of an ordinary deed must be considered analogous."[22] In this case there was an implied delivery and acceptance, the grantee evidencing that he intended to assume the benefits of the pardon. The court express the opinion that the circumstances show a delivery by the governor of Texas, and such assent upon the part of the prisoner as amounted to a delivery to and acceptance by him. Indeed the complete analogy to an ordinary deed of grant is recognized. "Under the constitution and laws of the United States," said Judge Blatchford, in 1869, "a pardon must be regarded as a deed, to the validity of which delivery is essential. Never having been delivered it is revocable."[23] This case arose out of the revocation, by President Grant, of a pardon granted by his predecessor. An instructive discussion of this subject is found in *Ex parte* Powell.[24] The chief contention was that the pardon had never been delivered to

[17] U. S. v. Wilson, 7 Pet. 150.
[18] Lee v. Murphy, *supra*.
[19] Com. v. Holloway, 8 Wright, 210.
[20] *In re* Callicott, 8 Blatchf. 89.
[21] Rosson v. State, *supra*.
[22] Hunnicutt v. State, *supra*.
[23] *In re* De Puy, 3 Ben. 307, 4 Am. Law Rev. 188.
[24] 73 Ala. 517.

nor accepted by the prisoner. The court refer to the similarity, in its nature and effects, of a pardon under both State and federal governments, to that emanating from the representatives of the British crown in the parent country, whence our own jurisprudence is derived; and define a pardon alike under both systems, as a "mere act of grace, or governmental forgiveness of an offense, by which the penalty of the crime is legally remitted." "The proposition is undeniable" say the court, "at least on authority, that a pardon, in order to be complete, must in contemplation of law be delivered and accepted. * * * We think the principles applicable to the delivery of a pardon and of an ordinary deed of gift must be considered as analogous." This court also approves the view that delivery and acceptance may be implied from circumstances. Similar views are expressed in other cases.[25] This last case recognizes the view that delivery and acceptance may be implied from circumstances. There the recipient of the favor was availing himself of the benefits of the pardon, from which the court inferred that he had accepted it. Many interesting collateral questions, as before suggested, have arisen, but this article has already assumed proportions not contemplated at the outset. A discussion of these matters, such as the doctrine of presumption, judicial knowledge, the effect of legislative acts, cannot affect the main principles we have been investigating. It is believed that enough has been said to demonstrate the correctness of the position first announced. Whenever it is desired to extradite a criminal who is undergoing sentence, and who would naturally resist such an attempt to remove him, it may be easily accomplished by commuting his sentence, by striking off all but a fraction of his term of imprisonment. This act he may not resist. His assent is not a prerequisite to the validity of this act of commutation. By cutting off all but a day remaining of his term of imprisonment, he may with facility be removed to the scene of his, perhaps more henious achievements. But a grant of freedom *in invitum*, is not recognized by authority as valid, and is without utility for all purposes. It may be argued that this raises a nice distinction which is without practical value; yet it is submitted that it is ever better to let the streams flow unvexed in their ancient channels, that it is never valueless to preserve inviolate the land marks of olden times. It is ever better to cherish that which is stamped with the approval of the sages of the law, than to rashly indulge in a spirit of wanton inconoclasm.

ALFRED F. SEARS, JR.

Portland, Oregon.

[25] *Ex parte* Reno, 66 Mo. 266; State v. Baptiste, 26 La. Ann. 134.

CONVERSION OF MORTGAGED CHATTELS—LIABILITIES—PLEADING.

HILL v. CAMPBELL COMMISSION CO.

Supreme Court of Nebraska, March 3, 1898.

1. One who converts the property of another is liable therefor.

2. Every one who aids and assists in the conversion of the chattels of a third person is liable for their value.

3. A mortgagee of chattels, who is out of possession, and not entitled to possession by his mortgage, cannot maintain an action against a stranger for conversion.

4. In an action by a mortgagee of chattels for conversion of mortgaged property, he must, in his petition, plead the facts which create his special ownership in the property, and show his right to the possession of the same.

NORVAL, J.: Warren Fales resides in Cuming county, and is engaged in the business of raising, feeding, buying and selling of cattle. He executed and delivered to the plaintiff, John L. Hill, three chattel mortgages, on 219 specifically described steers, then in the possession of Fales, in said county, to secure the indebtedness incurred for the purchase price of the cattle, which mortgages are described as follows: "One dated March 15, 1892, to secure $463.96, duly filed for record on the 26th day of the same month; another dated April 6, 1892, for the sum of $2,860.52, which was duly recorded two days later; and the other was given May 21, 1892, for $1,440.82, which was duly filed for record six days after its date." Subsequently, on June 14, 1892, Fales gave to the Campbell Commission Company, of Chicago, one of the defendants herein, a chattel mortgage on 300 steers; and on November 4, 1892, Fales gave said company a second chattel mortgage on 80 steers. On October 20, 1892, Fales executed and delivered to the defendants Foley & Chittenden, of South Omaha, a chattel mortgage on 170 steers, to secure an indebtedness of the mortgagor to said last-named firm. The evidence shows the cattle belonging to Fales, and on which he had executed mortgages as aforesaid, were shipped to, and sold by, the Campbell Commission Company, as follows: 80 head on January 18, 1893, and 243 head on January 27th of the same year. On the next day, 45 steers owned by Fales were shipped to

South Omaha, and sold by the defendant Foley & Chittenden. Plaintiff contends that the foregoing shipments included 100 steers, upon which he held senior mortgage liens, and that said cattle were sold by defendants without plaintiff's knowledge and consent. This action was instituted in the court below, to recover damages for the conversion of cattle covered by plaintiff's mortgages. The defendants recovered verdicts upon the trial, and, from the judgment rendered thereon, plaintiff prosecutes a petition in error.

The record discloses that, at the trial, plaintiff, in open court, limited his claim to a recovery to the conversion of cattle by the defendants included in the shipment under the date of January 27th, already alluded to. The evidence contained in the bill of exceptions tended to show that said 243 head were shipped to, and sold by, the Campbell Commission Company, without plaintiff's knowledge or consent; that he held superior mortgage liens upon a portion of the cattle included in said shipment; that one Clausen, the agent and representative of the Campbell Commission Company, and Foley, of said firm of Foley & Chittenden, procured the cattle to be shipped, assisted Fales cutting out the 243 steers from the remainder of the herd, in driving them to Pender, and in loading them on the cars at that place for shipment to Chicago. Foley and Fales went with the stock to Chicago, where the cattle were delivered to, and sold by, the Campbell Commission Company, and the proceeds were applied by the defendants to their own use.

Instructions 5, 6, 9, and 10, given by the court on its own motion, and defendants' eighth request, are criticised by counsel for plaintiff. The first four of these are in the language following: "(5) But, if you find from a preponderance of the evidence that there was some of the P and K cattle in the shipment of 243 head, you will then further inquire and determine how and under what circumstances, and by whom, the said shipment was made; and you are instructed that if said shipment was made by Warren Fales of his own volition, and without insistence or direction from the defendants, or either of them, then the defendants would not be liable in this action, and your verdict should be in favor of defendants. (6) To justify a verdict in favor of the plaintiff, it must appear from a preponderance of the evidence that defendants, or one of them, directed and caused said shipment to be made for their own use and benefit, and without the consent of the plaintiff, and that there were cattle in said shipment on which plaintiff held a first mortgage lien." "(9) If said shipment of 243 head was made voluntarily by Warren Fales, and not by the direction of the defendants or either of them, the plaintiff cannot recover in this action. (10) The fact alone that James Foley assisted in assorting and loading the cattle, and went to Chicago with them, would not justify a verdict against him or any of the defendants. To hold the said Foley or his firm liable, it must appear that he was acting in a capacity different from a hired man, or in giving neighborly assistance. It must appear from the evidence that the shipment was made by reason of some direction or control of one or both of the defendants in pursuance of which said Foley acted." The defendant's eighth request was to the effect that if the mortgagor, Fales, shipped the cattle of his own volition, and that the Campbell Commission Company took no part in procuring the shipment to be made, except as requested by Fales, and that said company acted in good faith in selling the cattle without any intention to appropriate the cattle, or the proceeds of the cattle, on which plaintiff had a lien, the plaintiff was not entitled to a verdict.

The following propositions are deducible from the authorities: A conversion is any unauthorized act which deprives the owner of his property permanently or for an indefinite time. Stough v. Stefani, 19 Neb. 468, 27 N. W. Rep. 445. In an action for conversion, the motive which prompted the defendant to dispose of, or appropriate to his own use, the property of plaintiff, is an immaterial issue. Whether defendant acted in good faith or not is of no consequence. Morrill v. Moulton, 40 Vt. 242; Freeman v. Underwood, 66 Me. 229; Miller v. Wilson, 98 Ga. 567, 25 S. E. Rep. 578; Union Stockyard & Transit Co. v. Mallory, Son & Zimmerman Co., 157 Ill. 554, 41 N. E. Rep. 888; Hoffman v. Carow, 22 Wend. 285; Koch v. Branch, 44 Mo. 542; Knapp v. Hobbs, 50 N. H. 476; Lee v. Mathews, 10 Ala. 682; Spraights v. Hawley, 39 N. Y. 441; Kimball v. Billings, 55 Me. 147; Tobin v. Deal, 60 Wis. 87, 18 N. W. Rep. 634; Platt v. Tuttle, 23 Conn. 233; Lee v. McKay, 25 N. Car. 29. One who aids and assists in the wrongful taking of chattels is liable for a conversion, although he acted as agent for a third person. McCormick v. Stevenson, 13 Neb. 70, 12 N. W. Rep. 828; Stevenson v. Valentine, 27 Neb. 338, 43 N. W. Rep. 107; Cook v. Monroe, 45 Neb. 349, 63 N. W. Rep. 800; D. M. Osborne & Co. v. Plano Mfg. Co., 51 Neb. 502, 70 N. W. Rep. 1124; McPartland v. Read, 93 Mass. 231; Edgerly v. Whalan, 106 Mass. 307; Lee v. Mathews, 10 Ala. 682; Gage v. Whittier, 17 N. H. 312; Kimball v. Billings, 55 Me. 147; McPheters v. Page (Me.), 22 Atl. Rep. 101.

Under the foregoing principles, each and all of the instructions to which reference has been made were manifestly erroneous. By the fifth, sixth, ninth and tenth instructions, the jury were advised that there could be no recovery if Warren Fales voluntarily, and of his own accord, without the aid and insistence of the defendants, shipped the cattle, even though the Campbell Commission Company sold the cattle on their arrival in Chicago without plaintiff's consent, and appropriated the proceeds to their own use. The tenth instruction was faulty, because it conflicts with the rule which makes one who abets in a conversion of property liable for its value. The eighth instruction, given at the request of the defendants, was bad, since it exonerated them from liability if they acted in good faith. If one sells the chat-

tels of another without authority so to do, the act cannot be made any the less a conversion by proving that he acted in good faith, believing himself to be their owner, or was the agent of one whom he regarded to be the owner.

It is argued by counsel for defendants that the amended petition does not state a cause of action; hence no prejudice could have resulted from the giving of the instructions. If plaintiff's pleadings would not have supported a verdict in his favor had one been returned, it is obvious that he cannot be heard to complain of errors in the charge of the court. It is not claimed by plaintiff that the paper filed by him, which is designated "Amended Petition," states any ground for action; but it is insisted that it is merely an amendment to the original petition, and was not intended to take the place of the latter. This position is undoubtedly sound, and was doubtless so regarded by the defendants in the court below, inasmuch as they answered both the "petition and the amended petition." Construing the original and the amended petitions together, they do not state sufficient facts to authorize a recovery for the conversion of the cattle. Plaintiff alleges the execution by Fales to himself of three chattel mortgages on 219 steers then in the possession of the mortgagor, the recording of the mortgages, that plaintiff had a lien on the property, and that defendants had personal knowledge thereof. There is not pleaded a single condition contained in any of the mortgages, nor is it alleged that any condition has been broken, or that any portion of the mortgage debt is due. The averment that plaintiff has a lien on the cattle is a mere conclusion of law. The Code requires a pleading to set forth the facts, and not conclusions of law. Rainbolt v. Strang, 39 Neb. 339, 58 N. W. Rep. 96. No fact is stated showing that plaintiff had the right of possession of the property in dispute. The petition should have pleaded the facts constituting special ownership and plaintiff's right to possession at the commencement of the action. Hudelson v. Bank, 51 Neb. 557, 71 N. W. Rep. 304; Raymond v. Miller, 50 Neb. 506, 70 N. W. Rep. 22. The last case was an action for conversion by a mortgagee of chattels against a stranger, and the petition was held defective. In the opinion it was said: "It will be observed that there is no averment in the petition to the effect that plaintiffs are the general owners of the chattels in controversy, but that they predicate their right to recover damages for the alleged conversion merely upon a claim of special interest or ownership in the property, arising by virtue of a chattel mortgage. The terms and condition of the mortgage are not pleaded, nor any facts averred which disclose that any of the stipulations therein contained have been broken, or that anything is due plaintiffs upon the mortgage. * * * Plaintiffs, in order to set forth a cause of action, were required to plead in their petition the facts constituting their special interest in the property, as well as the facts relied upon to entitle them to maintain an action for conversion against the defendants. This they have not done." The following authorities sustain the doctrine that the mortgagee of chattels cannot maintain conversion against one who took wrongful possession of the same, where at such time he was not in possession, nor entitled to the immediate possession, of the property. 4 Am. & Eng. Enc. Law, 119; 1 Chit. Pl. 167, 618; Owens v. Weedman, 82 Ill. 409; Baker v. Seavey, 163 Mass. 522, 40 N. E. Rep. 863; Bank v. Fisher, 55 Mo. App. 51; Chandler v. West, 37 Mo. App. 631; Barnett v. Timberlake, 57 Mo. 499; Draper v. Walker, 98 Ala. 310, 13 South. Rep. 595. The judgment is affirmed.

NOTE.—*Recent Cases as to Acts Constituting Conversion and Liability Therefor.*—One who sells property as under a mortgage which was not included therein is liable for the conversion, whether he knew it was not included or not. Kenny v. Ranney (Mich.), 55 N. W. Rep. 982, 96 Mich. 617. Plaintiff purchased a building on land which he thereafter leased from the owner. By the terms of the lease, he could remove all buildings from the land at its expiration. Defendant purchased the land while the building was still there. Held that, on defendant's refusing to permit plaintiff to remove the building, he could recover for a conversion thereof. Osborn v. Potter (Mich.), 59 N. W. Rep. 606. Where a person to whom a load of cotton has been taken to be ginned refuses to allow the owner to take it away until he pays a bill owed by a third person, it is a conversion of the cotton. Hearn v. Bitterman (Tex. Civ. App.), 27 S. W. Rep. 158. An act inconsistent with the owner's right, as a refusal to give up property except at the end of a replevin suit, is sufficient to make out a case of conversion. Banking House v. Brooks, 52 Mo. App. 364. A creditor of an estate, who has possession of stocks payable to deceased as executrix, commits no conversion in holding them for her executor as against her successor in the administration of her husband's estate, pending the decision of said successor's suit against her estate for her conversion of said stocks. Mills v. Britton, 29 Atl. Rep. 231, 64 Conn. 4. Where a railroad company kills an animal of another, and converts the same to its own use, it is liable in trover, whether the killing be negligent or not. Atchison, T. & S. F. R. Co. v. Tanner (Colo. Sup.), 36 Pac. Rep. 541. Where hogs were delivered to defendant for sale by him as broker, he is not liable in trover as for having wrongfully obtained possession of the hogs, though he failed to remit the proceeds. Lewis v. Metcalf (Kan.), 36 Pac. Rep. 345. An assignee for the benefit of creditors, knowing that the brewery and machinery of his grantor is subject to a prior mortgage, should separate therefrom any property not covered by the mortgage, and he cannot claim that a purchaser under the mortgage is guilty of conversion because he takes possession, under writ of sequestration, of casks constituting part of such machinery, and which at the time contain beer belonging to the assignee. Meyer v. Orynski (Tex. Civ. App.), 25 S. W. Rep. 655. Obtaining possession of property by purchase of the owner, knowing that he is incapable, because of intoxication, to make a contract, and retaining possession to the exclusion of the rights of the owner, constitutes conversion. Baird v. Howard (Ohio Sup.), 36 N. E. Rep. 732. Where an auctioneer, though acting in good faith, sells goods, and pays over the proceeds to a party delivering the same to him, he is lia-

ble to the real owner for conversion of the same. Kearney v. Clutton (Mich.), 59 N. W. Rep. 419. A purchaser of cattle, who drives from the pasture a greater number than he has bargained for, is guilty of a conversion of the excess to his own use, even though he may have been acting under a mistake; and, in an action for such conversion, evidence as to the contract of purchase is admissible. Williams v. Deen, 24 S. W. Rep. 536, 5 Tex. Civ. App. 575. A demand and refusal to deliver a certificate of stock which defendant honestly believes has been burned does not show conversion. McDonald v. Mackinnon (Mich.), 62 N. W. Rep. 560. A person who takes away wood after being notified of the title of another thereto is liable for its conversion. Noyes v. Stone (Mass.), 40 N. E. Rep. 856. A plaintiff who dismisses a garnishment of goods claimed by the garnishee under a mortgage given by defendant, and subsequently attaches the goods in the mortgagee's hands, is not liable for conversion. Toledo Sav. Bank v. Johnston (Iowa), 62 N. W. Rep. 748. Where defendant directed his employee to feed his cattle with hay belonging to plaintiff, which was on defendant's farm, and the employee made such use of a part of the hay defendant was guilty of a conversion of it all. Brown v. Ela (N. H.), 30 Atl. Rep. 412. Where goods similar in kind are delivered in a lump to a warehouseman for storage, part of which are subject to a mortgage, the refusal of the warehouseman to select from such goods those subject to the mortgage, does not constitute a conversion thereof. Economy Furniture Co. v. Chapman, 54 Ill. App. 122. In an action for conversion, it appeared that plaintiff was lessee for five years of certain heifers, the product of which was to be divided between him and the owner; that plaintiff wrote the owner that she must either take $11 per head, or come and get the cattle, as there was no feed on their range; that the owner reasonably accepted the offer, and waited three weeks for plaintiff to close the sale; that he did nothing; and that her husband, as her agent, took the cattle. Held, that there was no conversion. Powers v. Klenzie (Mont.), 38 Pac. Rep. 833. A finding that barley subject to mortgages to plaintiff and defendant was to be stored by defendant in plaintiff's name, that he stored it in his own name, that plaintiff's demand of enough to secure his claim was not complied with, and that the barley was sold by defendant, and the proceeds retained by him, shows a conversion of the barley. Fette v. Lane (Cal.), 37 Pac. Rep. 914. Defendants, pursuant to plaintiff's instruction, forwarded a note belonging to him to an investment company for collection. The note was collected, but without defendants' knowledge the proceeds were credited to them on securities in their hands belonging to the company, and the company became insolvent without returning the proceeds. Held, that there was no conversion of the note by defendants. Gilbert v. Walker, 30 Atl. Rep. 132, 64 Conn. 390. Defendant agreed with S, its debtor, to prepare a three months note for S to sign, and to accept the same in satisfaction of its claim, provided S procured the indorsement of a responsible person within two days. On the next day defendant induced S to execute to it a bill of sale of his stock as temporary security till an indorser of the note could be procured, whereupon the sale was to be of no effect. On the day following, S tendered a responsible indorser, who objected to the form of the note, which defendant had made payable on demand, but the latter declined to prepare another in the form agreed on, and took possession of S's stock under the bill of sale, together with the proceeds of sales made since its execution. Held, that defendant was liable for conversion. Lovell v. Hammond Co., 34 Atl. Rep. 511, 66 Conn. 500. Defendant bought at execution sale, personal property on which plaintiff had a lien, and agreed with plaintiff to take the property subject to the lien, and sell the same for plaintiff, or pay cash therefor himself; the title to remain in plaintiff until payment of the money. Held, that where defendant kept the property, and refused to pay cash therefor, or to deliver the same to plaintiff on demand, such conduct constituted a conversion. Wilson Coal & Lumber Co. v. Hall & Brown Woodworking Mach. Co. (Ga.), 22 S. E. Rep. 530. Where a person sends a draft to a corporation, to be discounted, and the proceeds used to pay a note of the corporation on which the sender was liable as indorser, and the president of the corporation, though ignorant that the draft was sent for such purpose, uses the proceeds to pay other debts of the corporation, he is liable to the sender for conversion of the draft. Kidder v. Biddle, 42 N. E. Rep. 293, 13 Ind. App. 653. A lease of land made in March authorized the lessee to sow the land in wheat, and provided, in case of a sale of the land by the lessor, that the lessee should give possession on 30 days' notice. The lessor died after the land was sowed in wheat, and the land was sold, by order of the court, in February following, and possession given by the lessee to the purchaser, who harvested the wheat in the following July, without objection from the lessee Held, that the lessee could not recover in conversion the value of the wheat from the purchaser. Austin v. McMains (Ind. App.), 43 N. E. Rep. 141. Where a tenant who sowed wheat on shares assigned his interest before harvest, a sale of the tenant's share by the landlord, whether made before or after the assignment, and his refusal to let the assignee remove the same, gave the latter a right of action against the landlord for conversion. Dale v. Jones (Ind. App.), 44 N. E. Rep. 316. An invalid attempt to foreclose a chattel mortgage, the mortgagee bidding in and retaining the property, is not a conversion thereof. Brown v. Mynard (Mich.), 65 N. W. Rep. 293. Plaintiff employed defendant as an attorney to bring suit on a claim, and sent a check, payable to defendant's order, to cover disbursements. Defendant cashed the check, but, having induced the debtor to promise payment without suit, used the proceeds for his own purposes. Held, that trover for conversion of the check, or of the proceeds thereof, would not lie. Shrimpton & Sons v. Culver (Mich.), 67 N. W. Rep. 907. In an action on a note it appeared that, at the time defendant made it, she pledged to plaintiff's intestate other notes as collateral security; that decedent had repledged them as collateral to a loan made to himself, and that plaintiff was unable to produce them; that defendant admitted her liability on her note, and, in a counterclaim, prayed judgment against decedent's estate, for the difference between the value of the collateral notes and the amount due from her. Held, that the repledging of the notes was a conversion, and that defendant was entitled to judgment as prayed. Richardson v. Ashby (Mo. Sup.), 33 S. W. Rep. 806. Money taken forcibly, and without the consent of the owner, may be recovered back, though the owner was indebted to the wrongdoer in an amount as great as the sum taken. Murphey v. Virgin (Neb.), 66 N. W. Rep. 652. Where an attachment is levied on the property of a third person under the mistaken belief that it belongs to the defendant in the attachment suit, the title of the owner is not thereby changed, unless he treat the property as abandoned to the officer or attaching creditor, and sue for its conversion. That an officer forecloses a chattel mortgage, invalid

as against an attaching creditor of the mortgagor, for failure to record the same, the possession of the property being in no way interfered with by the officer or purchaser at the foreclosure sale, does not constitute a conversion, as against the attaching creditor. Thorp v. Robbins (Vt.), 33 Atl. Rep. 896. Where a chattel mortgagee finds the mortgaged property in the possession of defendant, and demands it, and defendant replies that nobody could get the property who did not have a better right, it constitutes conversion. Mitchell v. Thomas (Ala.), 21 South. Rep. 991. Acceptance by a creditor from his debtor of a preferential security, voidable under the insolvent law, is not a conversion. Hay v. Tuttle (Minn.), 69 N. W. Rep. 696. Refusal of a corporation to issue certificates to the owner of shares of stock is a conversion of the shares for which trover will lie; and a petition alleging that certificates were fraudulently and without authority canceled, and that the corporation refused to issue others in lieu thereof, states a cause of action. Withers v. Lafayette County Bank, 67 Mo. App. 115. It is a conversion of a note to negotiate it where it was obtained by false representations, or was given to be used only on a contingency which had not occurred. Boyer v. Fenn (City Ct. N. Y.), 43 N. Y. S. 506. A sale of property by one of two joint owners does not constitute a conversion of the interest of the other owner by the purchaser. Worsham v. Vignal (Tex. Civ. App.), 37 S. W. Rep. 17. Plaintiff alleged that at the instance of defendants he employed D to get out ties for a railway company, for which defendants agreed to pay plaintiff or D a certain price; that D gave him a mortgage on the ties to secure money advanced; that subsequently defendants and the railroad company, with the consent of plaintiff or D, took the ties into possession, and converted them to their own use. Held that, as the ties were taken with the consent of plaintiff, the action would not lie as an action for conversion. Houston, E. & W. T. Ry. Co. v. Garrison (Tex. Civ. App.), 37 S. W. Rep. 971. Sand or gravel, while it remains in the original bed where deposited, is part of the realty, and cannot be subject to an action for conversion. Glencoe Sand & Gravel Co. v. Hudson Bros. Commission Co. (Mo. Sup.), 40 S. W. Rep. 93. An agent who, in behalf of his principal, takes the property of another without the latter's consent, is, as to the latter, guilty of a conversion, though, through ignorance of the state of the title, he acted in good faith, and turned the property over to his principal before he had notice who was the owner. Miller v. Wilson (Ga.), 25 S. E. Rep. 578, 98 Ga. 567. Every person who abets in the conversion of the property of a third person is liable for the value of the property converted. D. M. Osborne & Co. v. Plano Mnfg. Co. (Neb.), 70 N. W. Rep. 1124.

BOOK REVIEWS.

ENGINEERING AND ARCHITECTURAL JURISPRUDENCE.

This volume, in the form and style of a legal treatise possesses a special value, not only to practitioners interested in the law pertaining to construction, but also to engineers, architects, contractors and builders. It contains a well written text stating the general propositions of law governing the subject and a numerous citation of authorities in notes. It is a book of nearly nine hundred pages, bound in cloth. Published by John Wiley & Sons., New York.

BOUVIER'S LAW DICTIONARY, VOL. 1.

We find it stated in the preface that "this work as originally prepared by its learned author, Judge Bouvier, in 1839, was more strictly a dictionary of the law. The edition of 1867 was prepared by many hands, and was somewhat of a legal encyclopedia as well as a law dictionary. The edition of 1883, which was the work of the present editor, added a large amount of new matter along both lines, but more particularly in the way of an encyclopedia. In the present edition it has been the editor's aim to make the work a complete dictionary of the law and also to develop still more fully its encyclopedic side, extending very largely the lines on which the editions of 1867 and 1883 were based, and he has endeavored, by rearranging titles and by cross-references, to unify and harmonize the whole. · · · The present edition contains a large number of words which did not appear in the earlier editions as well as very many words and titles which have come into the law in late years. · · · A large part of the work has been rewritten and every title has been carefully revised and corrected." It seems needless to say anything as to character and reputation of this work, which has, for years, been well and favorably known to all practitioners. We feel that we voice their sentiment in giving a cordial welcome to this new edition and we regard it as a fortunate circumstance that its preparation has been in the hands of so competent a jurist as Francis Rawle, Esq. This volume has about eleven hundred pages and presents a handsome typographical appearance. The second volume, we understand, will shortly appear. It is published by the Boston Book Co., Boston, Mass.

BOOKS RECEIVED.

A Compendium of Insanity. By John B. Chapin, M.D., LL.D., Illustrated. Philadelphia: W. B. Saunders, 925 Walnut Street, 1898.

Illinois Criminal Law and Practice, Illustrated and Construed by the Decisions of the Courts, with Forms of Indictments. By Ossian Cameron, LL.B., of the Chicago Bar. Chicago: E. B. Myers & Company. 1898.

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions, and except those Opinions in which no Important Legal Principles are Discussed of Interest to the Profession at Large.

1. ADMINISTRATION—Executors De Son Tort—Contracts.—The sons and sole heirs-at-law of a banker, who died intestate, continued the business of the bank after his death, and prior to the appointment of an administrator; and during such time certificates of deposit were issued, and deposits received, in the name of the bank. Some of the certificates were in renewal of former certificates canceled, and some covered deposits made both before and after the father's death: Held, that the sons had no power to bind the estate by any new contracts, though the business was continued for its benefit, and that they became individually liable on the obligations so created.—KELLEY v. KELLEY, U. S. C. C., S. D. (Ohio), 84 Fed. Rep. 420.

2. ADMINISTRATION—Foreign Judgment against Executor.—Letters testamentary have no extraterritorial operation, and a judgment rendered in a foreign State against an executor appointed in Alabama is void.—JEFFERSON v. BEALL, Ala., 23 South. Rep. 44.

3. APPEAL—Bill of Exceptions.—Under Rev. St. 1894, § 642 (Rev. St. 1881, § 630), providing that either party may reserve any question of law decided during the progress of the cause, the overruling of a motion for a new trial cannot be considered on the filing of a bill of exceptions under such section, as the question did not arise during the progress of the cause.—HANEY v. FARNSWORTH, Ind., 49 N. E. Rep. 383.

4. APPEAL—Special Findings by the Court.—Where the record shows that what purports to be a special finding made and filed by the judge trying the case was not signed by him, it can only be treated as a general finding.—SMITH v. GOETZ, Ind., 49 N. E. Rep. 386.

5. APPEAL—Grantee Pendente Lite.—Where an undertaking on appeal is given, pursuant to section 1000, Rev. St. U. S., to a plaintiff in a cause involving the possession of land, a grantee of the plaintiff *pendente lite* acquires no right which can be enforced in his own name in an action upon the undertaking, unless such grantee shall have had himself substituted as plaintiff in the original action.—HANKS v. MATTHEWS, Utah, 52 Pac. Rep. 7.

6. ASSAULT AND BATTERY—Arrest.—A charge that if defendant, in executing a warrant, was acting as an officer in good faith, the jury cannot convict him of assault and battery of a high and aggravated nature, would erroneously take away from the jury the question whether defendant acted with unnecessary rudeness toward prosecutor.—STATE v. CLARK, S. Car., 28 S. E. Rep. 906.

7. ASSIGNMENT FOR CREDITORS—Validity.—A chattel mortgage given to several creditors, with an oral understanding that one should take possession and convert the property into money for the benefit of all, is in effect a voluntary assignment for the benefit of creditors, though all the mortgagor's property is not included in the mortgage.—DAHLMAN v. GREENWOOD, Wis., 74 N. W. Rep. 215.

8. ATTORNEY'S LIEN—When Allowed.—An attorney called in by other counsel to assist them in the preparation and trial of an action has a lien for his services on the judgment obtained by his clients in said action.—PEOPLE v. PACK, Mich., 74 N. W. Rep. 185.

9. BANKS AND BANKING—Checks—Refusal to Pay—Liability.—A bank is not justified in refusing to pay a check because the drawer orders it not to pay it, where it has sufficient funds of the drawer on deposit to pay it when presented for payment.—GAGE HOTEL CO. v. UNION NAT. BANK, Ill., 49 N. E. Rep. 420.

10. BASTARDY—Evidence—Resemblance to Defendant.—A conviction in bastardy proceedings will not be reversed because the jury was asked to consider an alleged resemblance between defendant and the child.—PEOPLE v. WING, Mich., 74 N. W. Rep. 179.

11. BILLS AND NOTES—Assignments.—To hold an assignor of a non-negotiable note liable, the maker must be pursued to insolvency.—EDGEWOOD DISTILLING CO. v. NOWLAND, Ky., 44 S. W. Rep. 364.

12. BILLS AND NOTES—Non-negotiable Notes.—Where the eight promissory notes sued on each contains the following words: "This note is secured by a mortgage on real estate. This note may become due and payable at once by reason of the failure to comply with the conditions of the accompanying mortgage, which is made a part hereof;" and where the mortgage securing the notes and therein referred to provided that the notes which, by their terms, matured at different dates, should become at once due and payable upon the failure of the mortgagor to pay the taxes and assessments levied against the mortgaged land before the same became delinquent: Held, that the notes were non-negotiable.—WISTRAND v. PARKER, Kan., 52 Pac. Rep. 59.

13. BILLS AND NOTES—Waiver of Protest.—Where there is a waiver by the drawers and indorsers of presentment for payment and notice of non-payment contained in the body of a negotiable note, the indorsers adopt such agreement by their indorsement, and they cannot complain of the indorsee's delay in bringing suit; the maker having become insolvent some time after the maturity of the note.—STATE v. HUGHES, Ind., 49 N. E. Rep. 398.

14. BOUNDARIES—Adjustment by Parol.—Where the true line between two adjoining owners is uncertain or unascertained, they may mutually adjust the line by parol; and a fence erected on such line, and acquiesced in for 30 years, becomes the legal division.—TRITT v. HOOVER, Mich., 74 N. W. Rep. 177.

15. BUILDING AND LOAN ASSOCIATIONS—Taxation.—A building and loan corporation formed under the general law, whose shares were exempt from taxation to the extent of its investment in mortgages, afterwards accepted an amendment to its charter by Acts 1892, ch. 171, whereby its powers were greatly increased, and its field for investment more widely extended: Held, that shares invested in mortgages under such additional powers are subject to the laws regulating corporations formed by special act, and are not exempt from taxation.—SALISBURY PERMANENT BLDG. & LOAN ASSN. v. COMMRS. OF WICOMICO COUNTY, Md., 39 Atl. Rep. 425.

16. CARRIERS OF GOODS—Limiting Liability.—A condition in a shipping contract providing that the cars are to be in charge of the shipper while in transit, and that the shipper assumes the duty of caring for the stock at his own expense and risk, is not in violation of Code, § 2074, providing that no contract shall except any railroad corporation from the liability of a common carrier, where the shipper has assumed control, unless the carrier seeks by said condition to escape liability for injury caused by its failure to furnish proper facilities.—GRIEVE v. ILLINOIS CENT. R. CO., Iowa, 74 N. W. Rep. 192.

17. CHATTEL MORTGAGE—Validity—Antecedent Debt.—A chattel mortgage, taken in good faith, on a stock of merchandise, given to secure an antecedent debt, the inducement to the giving of which mortgage was a promise of further advances or credit to the mortgagors, which advances were made as promised, is a valid lien, to the extent of advances so made, on goods sold by third parties to the mortgagors, who were induced to sell, before said advances were made, by false representations of mortgagors that they owed nothing on their stock of goods; said mortgage being given after said goods were sold, and after said advances were made.—HEES v. CARR, Mich., 74 N. W. Rep. 181.

18. CONSTITUTIONAL LAW—Female Suffrage.—Const. art. 2, § 2, provides that in all elections not otherwise provided for, every white male citizen shall be entitled to vote. Article 8, § 3, provides that the legislature shall provide for the establishment of a uniform system of common schools. Sess. Laws 1891, p. 130, § 1, provides that in all school districts any citizen shall be entitled to vote at a school meeting who "has property in the district upon which he or she pays a tax:" Held, that women are entitled to vote at a school meeting for director of the district, the constitutional qualifications not applying to voters provided for under the special power of the legislature to establish a system of common schools.—HARRIS v. BURR, Oreg., 52 Pac. Rep. 17.

19. CONSTITUTIONAL LAW — Interstate Commerce — State Statutes.—A State statute declaring that a common carrier accepting goods for transportation to a point beyond its own terminus assumes an obligation for their safe carriage to that point, unless otherwise provided by a written contract signed by the shipper (Code Va. 1887, § 1295), merely establishes a rule of evidence, and does not restrict the right of the carrier to limit his obligation by contract, and hence is not, as applied to interstate commerce, a regulation thereof so as to be void under the federal constitution.—RICHMOND & A. R. CO. v. R. A. PATTERSON TOBACCO CO., U. S. S. C., 18 S. C. Rep. 335.

20. CONTRACT—Building Contract—Award.—The lowest bidder for the construction of a building, who fails to execute a bond, or to sign a contract therefor, as he understood he was to do, cannot maintain an action for damages for breach of contract, based upon his bid.—HOGAN v. SHIELDS, Mont., 52 Pac. Rep. 55.

21. CONTRACTS — Validity.—Contracts made during the late war, in one of the confederate States, payable in confederate money, will be enforced in the supreme court, when the value of same, as compared with lawful money of the United States at the time and place of contract, is ascertained by proof.—WHITE v. WHITE, La., 23 South. Rep. 95.

22. CORPORATION—Insolvent Corporation—Mortgage.—An insolvent corporation may mortgage its property to one who had been until immediately preceding the transaction a stockholder, although all the stockholders are her relatives, where it is a *bona fide* transaction for a valuable consideration.—BURCHINELL v. BENNETT, Colo., 52 Pac. Rep. 51.

23. CORPORATION—Insolvent Corporation—Officer as Creditor.—A director of a corporation, who is also a creditor, is not guilty of a fraud because he places his claim in judgment, and sells the property of the corporation thereunder, provided he thereby obtains no advantage of other creditors; and where he buys the property himself, and fails to divide the proceeds with another creditor, of whose claim he has no knowledge, he can be held accountable by such other creditor for only a proportionate share of the actual value of the property so obtained,—not less than the amount bid.—KITTEL v. AUGUSTA, ETC. R. CO., U. S. C. C. of App., Second Circuit, 84 Fed. Rep. 386.

24. CORPORATION — Capital Stock.—In the absence of statutory authority in that behalf a corporation, whether solvent or insolvent, has no legal power to reduce the fund represented by its capital stock by any formal or voluntary act on its part, to the prejudice of its creditors either then or thereafter existing, by distributing any part of it among the stockholders by way of dividend, or by giving any part of it to one or more stockholders, or by disposing of any part of it in any other manner, except by way of changing its form to meet the exigencies of the corporate business.—HAMOR v. TAYLOR-RICE ENGINEERING CO., U. S. C. C., D. (Del.), 84 Fed. Rep. 392.

25. CORPORATIONS — Transfer of Property — Ultra Vires.—The action of a corporation in transferring its property and business to another corporation is not *ultra vires* except as to creditors prejudiced thereby, or non assenting stockholders, and their right to a rescission may be waived.—POST v. BEACON VACUUM PUMP & ELECTRICAL CO., U. S. C. C. of App., First Circuit, 84 Fed. Rep. 371.

26. COUNTIES—Defective Bridges.—A county is liable to any person who, without contributory negligence, is injured by the fall of a defective bridge while such person is at work under the bridge. The statute giving the right of action applies as well to those who are rightfully under the bridge as to those who are traveling over it.—VICKERS v. BOARD OF COM'RS OF CLOUD COUNTY, Kan., 52 Pac. Rep. 73.

27. COUNTY—Pleadings — Complaint—Sufficiency.—A complaint, in an action by a county against its former clerk, alleging that defendant "had and received from said county, without any consideration whatever, in warrants drawn upon the treasury of said county," certain sums, and that said sums were received upon a pretended right to an additional compensation over the fees allowed by law, whereas defendant was not entitled to such additional compensation, and praying judgment for the amounts thereof, is bad, as not alleging that said warrants had ever been paid by the county.—KLAMATH COUNTY v. LEAVITT, Oreg., 52 Pac. Rep. 20.

28. COUNTY SUPERVISORS — Compensation.—A member of a committee appointed by the board of supervisors, from among their number, to confer with like committees from other counties to prevent the deposit of debris, gravel, and other material into rivers, cannot recover from the county compensation for his expenses or services; they being no part of his official duties, and not authorized by law.—IRWIN v. YUBA COUNTY, Cal., 52 Pac. Rep. 35.

29. COURTS—Jurisdiction — Federal Question.—A bill to restrain the enforcement of a city ordinance fixing the rates of charge by a water company, on the ground that such rates are so unreasonably low as to amount to a taking of the property of the water company without just compensation, presents a federal question.—CONSOLIDATED WATER CO. v. CITY OF SAN DIEGO, U. S. C. C., S. D. (Cal.), 84 Fed. Rep. 369.

30. CRIMINAL EVIDENCE—Homicide—Conspiracy.—In establishing a conspiracy to commit murder, declarations made by the conspirators during the interval of three or four months prior to the murder, some of which were made in defendant's presence and others not, are admissible as showing the very inception of the conspiracy.—PEOPLE v. GREGORY, Cal., 52 Pac. Rep. 41.

31. CRIMINAL EVIDENCE — Murder—Testimony of Co-defendant.—Code Cr. Proc. § 63, providing that in criminal cases the defendant shall be allowed to testify as to the facts and circumstances, did not make him a competent witness for a co-defendant with whom he was jointly indicted.—STATE v. FRANKS, S. Car., 28 S. E. Rep. 908.

32. CRIMINAL LAW—Disposing of Personal Property Covered by Lien.—Under Code Cr. Proc. § 277, providing that any person who disposes of or sells personal property on which a lien exists without the written consent of the lienholder, and shall fail to pay the debt or deposit the amount thereof with the clerk of the court within 10 days after such disposition, is guilty of a misdemeanor, a sale of cotton subject to a landlord's

lien by a constable under judicial process under a crop warrant issued by the landlord is not such a sale by the owner, who objected thereto, as will subject him to the terms of the statute, although he recovered back from the constable and owner of the lien the value of the cotton.—STATE v. JOHNSON, S. Car., 28 S. E. Rep. 905.

33. CRIMINAL LAW — Embezzlement.—A broker, who retained the difference between the amount asked by a vendor and the amount paid by the purchaser, and who admits the retention of such money, and claims title to it as his commission, is not guilty of embezzlement, under Pen. Code, § 511, providing that it is a defense that the property was appropriated openly, and under a claim of title preferred in good faith, even though such claim is untenable.—PEOPLE v. LAPIQUE, Cal., 52 Pac. Rep. 40.

34. CRIMINAL LAW — Forgery—Postal Orders.—An indictment for forging "a United States postal money order for" a certain sum, of a certain number and date, procured at a certain place, and payable at a certain place, to a certain person, did not sufficiently show the substantial parts of the order, no copy being set out.—PIERCE v. STATE, Tex., 44 S. W. Rep. 292.

35. CRIMINAL LAW—Jurisdiction—Municipal Courts.—An act granting a municipal corporation authority to make an offense against the State also an offense against the city, with power to prosecute therefor in the city court, as contrary to ordinance, violates Const. art. 5, § 12, requiring all prosecutions of offenses against the State to be in the name of the State, and to conclude against its peace and dignity; since prosecuting an offense against the State in a city court, under an ordinance making it an offense against the city, does not deprive the proceedings of the characteristics of a prosecution, or make the offense other than a State offense.—EX PARTE FAGG, Tex., 44 S. W. Rep. 294.

36. CRIMINAL LAW—Manslaughter—Resistance of Arrest.—Under Rev. St. 1889, § 3477, manslaughter in the fourth degree includes every unjustifiable homicide which was manslaughter at common law, and which is not declared to be manslaughter in some other degree: Held, that where a police officer shot deceased while resisting arrest, and used more force than was reasonably necessary to accomplish the arrest, or if, immediately after deceased ceased to resist, the officer, in the heat of passion, engendered by deceased's striking him, shot him intentionally, but without malice, he is guilty of manslaughter in the fourth degree.—STATE v. ROSE, Mo., 44 S. W. Rep. 329.

37. CRIMINAL LAW—Rape.—On a prosecution for rape of a child under the age of consent, evidence that prosecutrix had had intercourse with another person prior to the alleged intercourse with defendant was inadmissible as bearing against the corroboration which the birth of the child tended to give to the charge of intercourse with defendant.—STATE v. WHITESELL, Mo., 44 S. W. Rep. 332.

38. CRIMINAL PRACTICE—Seduction—Indictment.—An indictment for seduction will be quashed where it is found on the uncorroborated testimony of the prosecutrix, under Cr. Code 1886, § 4015, that no indictment or conviction for seduction shall be had under this section on the uncorroborated testimony of the woman on whom the seduction is charged.—HART v. STATE, Ala., 23 South. Rep. 43.

39. DECEIT—Fraudulent Representations.—The making of false and fraudulent representations to induce, and inducing, a contract, may be interposed to an action on the contract, though the contract does not include or refer to the representations.—WATSON v. KIRBY, Ala., 23 South. Rep. 61.

40. DEEDS—Construction.—Where one conveys property in trust to his children, the grantor to have the income during life, "and in case all or any of the said grantees or their issue shall survive the said grantor, then the property shall vest absolutely in the said grantees and their issue *per stirpes*, in equal shares, each of said grantees being a *stirps*," each of the surviving children will take an equal share, and, if any of them die before the grantor, leaving issue, such issue will take the share the parent would have taken.—ROTMANSKEY v. HEISS, Md., 39 Atl. Rep. 415.

41. DIVORCE—Residence of Wife.—A wife who seeks a divorce may acquire a residence within the State, although her husband resides outside of the State.—DUNN v. DUNN, Kan., 52 Pac. Rep. 67.

42. DISCOVERY — Order for Production of Books.—A plaintiff in an action at law is not entitled, under Rev. St. § 724, to an order for the production by the defendant before trial of private books of account for the plaintiff's inspection on an affidavit merely stating that affiant "believes" such books will tend to prove the issues in the mover's favor, without stating any grounds for such relief.—CASPARY v. CARTER, U. S. C. C., D. (Mass.), 84 Fed. Rep. 416.

43. EASEMENT—Highway — Prescriptive Easement.—If a highway is located along and over a prescriptive way, the public easement in the prescriptive way becomes merged in the public easement in the highway.—IN RE RAILROAD CROSSING IN TOWN OF OLD ORCHARD, Me., 39 Atl. Rep. 478.

44. ELECTIONS—Qualification of Contestant.—In contesting the right to an office to which the contestant was a candidate, the issue being who received the most of the legal votes cast, the qualification of either contestant or contestee need not be alleged or proved.—CHURCH v. WALKER, S. Dak., 74 N. W. Rep. 198.

45. EMINENT DOMAIN—Taking.—Defendant had a perpetual easement in one-half of an alley for the use of its surface, and the light and air above, and owned the title to the other half. Petitioner, in building its elevated railroad, placed the pillars on a portion of the half of the alley in which defendant had the easement, and projected the superstructure over the entire portion of such half and a portion of the other half: Held, that such construction constituted a taking of defendant's property to the extent of the projection.—METROPOLITAN W. S. EL. R. CO. v. SPRINGER, Ill., 49 N. E. Rep. 416.

46. EQUITY—Adverse Claim to Real Property.—Under 1 Hill's Ann. Laws, § 504, providing that one in possession of realty may sue another claiming an estate or interest therein adverse to him to determine such claim, an action lies in favor of one in possession against a purchaser of the land at execution sale who has served on plaintiff a notice to quit.—LOVELADY v. BURGESS, Oreg., 52 Pac. Rep. 25.

47. EQUITY—Decree—Res Judicata. — A decree dismissing a bill without prejudice does not render the matters therein decided *res judicata*.—O'KEEFE v. IRVINGTON REAL ESTATE CO. OF BALTIMORE CITY, Md., 39 Atl. Rep. 428.

48. EQUITY—Multifariousness. — Thirty-two insurers filed a bill to enjoin separate suits against them, and alleged that some of their policies covered insured's property in one of three buildings, and some in another, and some in all the buildings; that under each policy the insurer should not be held liable for a greater proportion of any loss than the amount insured therein should bear to the whole insurance; that insurers had jointly tendered the aggregate amount of an award that had been made under insured's agreement with them to arbitrate according to the provisions of each policy: Held, sufficient on demurrer for want of equity.—AMERICAN CENT. INS. CO. v. LANDAU, N. J., 39 Atl. Rep. 400.

49. EQUITY—Restraining Action at Law. — Where a party has a cause of action under well-settled rules of law, equity will not intervene to restrain a prosecution of such action in a court of competent jurisdiction on the ground that a hardship will be done in the individual case.—WIERENGO v. MASON, Mich., 74 N. W. Rep. 183.

50. EQUITABLE SET-OFF—When Allowed.—On the day the C bank went into the hands of a receiver it was

guarantor of two notes of $5,000 each, which it had discounted at the M bank, and for which it had been given credit on account. At the same time the M bank was indebted to the C bank $4,000 on account. The notes fell due 11 days afterwards, and the M bank then indorsed on them said $4,000: Held, that the latter bank was not entitled to treat the amount indorsed as an equitable set-off.—MECHANIC'S BANK OF DETROIT v. STONE, Mich., 74 N. W. Rep. 204.

51. EVIDENCE—Declarations of Agent—Hearsay.—The declarations of an agent of a liquor dealer, that he had sold liquor to a certain person, are not admissible in an action against the dealer for selling liquors to said person.—STATE v. SPENGLER, Miss., 23 South. Rep. 33.

52. EVIDENCE—Declarations of Employees.—In an action to recover damages from a railroad company for injuries to cattle caused by delay in the transportation of them, the declarations of the trainmen as to matters in the line of their respective duties, and relating to the cause of delay, made at the time and while they were charged with the duty of propelling the train, are admissible against the company. But such statements must relate to their conduct or duty at the time. Narrations of past occurrences, or of matters concerning which the employee making the statement had no knowledge, and did not make in the discharge of any duty, are inadmissible.—ATCHISON, T. & S. F. R. CO. v. CONSOLIDATED CATTLE CO., Kan., 52 Pac. Rep. 71.

53. EVIDENCE — Expert — Hypothetical Questions.—Hypothetical questions to an expert witness should be based upon the evidence, and should not assume the existence of matters material to the formation of a correct opinion, about which no testimony has been given.—DAVIS v. TRAVELERS' INS. CO., Kan., 52 Pac. Rep. 67.

54. EVIDENCE—Privileged Communications. — An attorney may testify that a certain person is his client. This is not a privileged communication.—ARKANSAS CITY BANK v. MCDOWELL, Kan., 52 Pac. Rep. 56.

55. EVIDENCE—Self Serving Declarations. — Declarations of a witness made out of court may be received in evidence to impeach, but are not admissible to corroborate, his sworn testimony, but this rule is subject to certain exceptions. The unsworn admissions and statements of a party made out of court, in the absence of the other party in interest, are not admissible for the purpose of corroborating his sworn testimony, except in extreme cases, where the rejection of the statements would work a real and manifest wrong; and in no case should such statements be admitted when it appears that the party making them has any interest or motive in making them, when he was subject to disturbing influences, or when the ultimate effect and operation arising from a change of circumstances could have been foreseen.—EWING v. KEITH, Utah, 52 Pac. Rep. 4.

56. EXECUTION—Range Levy.—Rev. St. 1895, art. 2350, providing that a range levy may be made upon stock, where it cannot "be herded and penned without great inconvenience and expense," does not authorize such levy upon stock in an inclosure containing 1,280 acres.—LINDSEY v. COPE, Tex., 44 S. W. Rep. 276.

57. EXECUTION SALE—Time of Removing Property.—The reasonable time which a purchaser of goods at execution sale has in which to remove them from premises leased by the execution debtor is the time required to move them with diligence, in the ordinary manner of moving such goods.—STERN v. STANTON, Penn., 39 Atl. Rep. 404.

58. FRAUDULENT CONVEYANCE—Innocent Purchaser—Inadequate Consideration.—When one, to defraud his creditors, devested himself of all his property, and, among other deeds, executed a deed to his wife of certain land, for a grossly inadequate consideration, though there was no evidence that the wife participated in or was aware of her husband's fraud, the conveyance to the wife will be set aside upon such conditions as will protect her equities in the land.—FIRST NAT. BANK OF FRANKFORT v. SMITH, Ind., 49 N. E. Rep. 376.

59. FRAUDULENT CONVEYANCES — Secret Trust.— A creditor of a firm induced it to return to him goods bought of him, and pay the balance due in cash. He then assumed certain debts due other creditors, by giving his notes therefor; and the firm gave him a note for the same amount, and a chattel mortgage, with possession and an unlimited time to sell the goods at private sale. The value of the property exceeded the firm's debts. There was a secret agreement that the creditor could pay unsecured creditors, who might be inclined to sue, out of the funds arising from the sale: Held, that the mortgage was void as to creditors, under 2 Rev. St. 1889, § 5170, providing that every conveyance "made or contrived with the intent to hinder, delay or defraud creditors," shall be void. — MCDONALD v. HOOVER, Mo., 44 S. W. Rep. 334.

60. FRAUDULENT CONVEYANCE—Subject to Debts.— Where a husband conveys property to his wife under stress of debts without adequate consideration, his debts exceeding the value of his remaining property, such property will be subjected to claims allowed against the husband's estate. — BLUE v. SCHURTZ, Mich., 74 N. W. Rep. 178.

61. FRAUDULENT CONVEYANCE—Subsequent Creditors.—A wife accepted a voluntary conveyance from her husband of all his property available for the payment of his debts, when she knew he was losing heavily from speculations, and that he contemplated withdrawing from the firm from which he derived his income. Shortly thereafter he sold his interest in the firm to protect it from his creditors. When he made the deed in November, he had large purchases of cotton outstanding on margins, and he was closed out in the following March: Held, that the conveyance was void against subsequent creditors, as it was made with intent to defraud them.—MINZESHEIMER v. DOOLITTLE, N. J., 39 Atl. Rep. 386.

62. GARNISHMENT—Summons—Time of Issuing.—Under 2 How. Ann. St. § 8038, providing that, at any time within 30 days after the final determination of a suit in justice court against the principal defendant, the justice shall, at the request of plaintiff, issue a summons against the garnishee, commanding him to appear and show cause why judgment should not be rendered against him, such summons must be issued within 30 days after rendition of judgment against the principal defendant.—KAYSER v. FARMERS' & MECHANICS' BANK, Mich., 74 N. W. Rep. 181.

63. HABEAS CORPUS—Federal Courts.—A federal court has jurisdiction to issue a writ of *habeas corpus* in behalf of one held by State authorities for trial on a charge of violating a State statute alleged to be in contravention of the federal constitution, but the prisoner should not be discharged unless under exceptional circumstances; the proper course ordinarily being to leave him to his remedies by appeal, in case he should be convicted.—BAKER v. GRICE, U. S. S. C., 18 S. C. Rep. 323.

64. HIGHWAYS—Injunction.—A proceeding to restrain the opening of certain land as a highway, on the ground that it had not been condemned, and that such highway had not been legally established, was properly appealed to the supreme court, as the title to the land was in issue therein.—BAUBIE v. OSSMANN, Mo., 44 S. W. Rep. 338.

65. HIGHWAYS—Public Convenience.—A road will be established if public convenience requires it, though there is no absolute necessity therefor, and it will be used by a few persons more than others.—FRITCH v. PATTERSON, Ind., 49 N. E. Rep. 380.

66. HOMESTEAD—Business Homestead.—One engaged in several lines of business, in separate buildings, can only claim one as his homestead.—PARRISH v. FREY, Tex., 44 S. W. Rep. 322.

67. HOMESTEAD — What Constitutes.—The right to a homestead exemption does not depend upon the mistaken or false statement of the exemptionist at the

time of borrowing money to the effect that he had no homestead exemptions, but upon the fact of his being entitled to the exemption under the law.—HINDS v. MORGAN, Miss., 23 South. Rep. 35.

68. HUSBAND AND WIFE — Community Estate.—All property held by either a husband or a wife before marriage remains the separate property of such consort, under the Spanish law; and the *status* of the property is to be determined by the origin of the title to the property, and not by the acquisition of the final title. —WELDER v. LAMBERT, Tex., 44 S. W. Rep. 281.

69. INJUNCTION—Railroad in Street.—While a bill for injunction should not be dismissed for want of equity, it being therein alleged that defendant railroad company was occupying a street with its tracks by license only of the city, and without consent of complainants, who owned abutting lots and the fee to the middle of the street, and without compensation therefor, still a preliminary injunction should not stand; the case, as made by the answer, being that the damage to complainants is small, while the track is important to the public as well as to defendant, for terminal facilities.—MOBILE & M. RY. CO. v. ALABAMA M. RY. CO., Ala., 23 South. Rep. 57.

70. INJUNCTION — Restraining Execution.—In an action by A and husband against S and others, plaintiffs recovered a judgment for certain land, and S appealed. A general demurrer to a plea of intervention, filed by the heirs of M, was sustained, and the heirs appealed. The interveners asserted and prayed foreclosure of a vendor's lien on the land, but did not ask a money judgment against S. The court of civil appeals determined that the actions by A and by the heirs were severable, and affirmed the judgment as to all the parties except said heirs, and as to them reversed and remanded the cause: Held, that S could not enjoin the execution of a writ of possession issued on said judgment in favor of A and husband.—ANDERS v. SPALDING, Tex., 44 S. W. Rep. 298.

71. INTOXICATING LIQUORS—Saloon Open on Sunday. —Defendant's living room was in the rear of his saloon, which had a front door, and also a door opening into the living room. On one side of the saloon was a hall, with a front door opening into the saloon, and there was no way of getting from the hall to the living room except through the saloon. On Sunday three men came into the hall, but did not go into the saloon. One asked for tobacco, and defendant stepped into the saloon, got it, and gave it to him. The bartender passed through the saloon that day: Held, that the saloon was not closed, within 3 How. Ann. St. § 2283*e*, providing that the word "closed" applies to the back door or other entrance, as well as to the front door; and that in prosecutions under the section it need not be proved that any liquor was sold.—PEOPLE v. SCHOTTEY, Mich., 74 N. W. Rep. 209.

72. INNKEEPERS — Lien.—The common-law lien of an innkeeper to secure his pay for keeping guests does not secure an account due him for board under a special contract.—REED v. TENEYCK, Ky., 44 S. W. Rep. 856.

73. JUDGMENT—Foreign Judgments—Title to Land.— A suit to determine the title of land lying in another State from that in which the suit is brought is purely *in personam*, and the decree therein rendered does not operate directly on the property or affect the title, but is made effectual only by coercion of the parties, and binds only them and their privies.—DULL v. BLACKMAN, U. S. S. C., 17 S. C. Rep. 333.

74. JUDGMENT — Res Judicata.—Since Code, art. 93, § 330, gives orphans' courts jurisdiction to decide caveats to wills, when issues involving the validity of a will have been passed upon by such a court its decision, unless reversed on appeal, is conclusive on all persons, whether actual parties or not.—MCDANIEL v. MCDANIEL, Md., 39 Atl. Rep. 423.

75. LIMITATIONS—Ejectment.—The owner of the undivided half of certain land, and also of a life estate in the other undivided half, of which his wife had died seised, conveyed it all by warranty deed, and the grantees entered into possession, and they and their grantees so continued, and such title remained undisputed until one of the heirs and grantee of the other heirs of said grantor and his deceased wife brought ejectment, 29 years after the death of said grantor. The disability of coverture of two of said heirs was removed, by Laws 1872, ch. 29, more than 20 years before such suit was brought, and none of the other heirs were under any disability during said 29 years: Held, that the action was barred.—BROWN v. CITY OF BARABOO, Wis., 74 N. W. Rep. 223.

76. LIMITATION OF ACTIONS—Landlord and Tenant.— One who, subsequent to a written lease, became a partner with the lessees, but did not agree in writing to pay the rent, was not bound on a written lease within the statute of limitations.—COLSTON v. LOUISVILLE TRUST CO., Ky., 44 S. W. Rep. 377.

77. MANDAMUS — Public School Teacher — Refusal to Employ.—A public school teacher, holding a State license of the first grade, covering the proposed term of employment, was selected by the trustees of a public school, but the county superintendent refused to employ him: Held, that the teacher had a valuable right under his license, the loss of which could not be compensated in damages; and hence it was sufficient, to entitle him to a *mandamus*, to compel the county superintendent to enter into a contract with him.—BROWN v. OWEN, Miss., 23 South. Rep. 35.

78. MASTER AND SERVANT—Defective Appliances—Assumption of Risks.—A workman who, for several weeks, has gone daily upon an uncleated inclined table to oil the machinery, without complaining of the want of cleats, assumes the obvious risks resulting from their absence, upon the negligent starting of the machinery by a fellow-servant.—AMERICAN DREDGING CO. v. WALLS, U. S. C. C. of App., Third Circuit, 84 Fed. Rep. 428.

79. MASTER AND SERVANT — Fellow-servant.—The liability of a master to an employee does not cease,—the employee not being informed of any change,—though, as between the master and a third person, a change is made by which thereafter the work is done for such third person.—MISSOURI, K. & T. RY. CO. OF TEXAS v. FERCH, Tex., 44 S. W. Rep. 317.

80. MASTER AND SERVANT — Injuries — Contributory Negligence.—The proximate contributory negligence of a plaintiff will defeat a recovery based on the simple negligence of the defendant.—ALABAMA G. S. R. CO. v. ROACH, Ala., 23 South. Rep. 52.

81. MASTER AND SERVANT — Negligence — Unguarded Hatchway.—A stevedore, who worked on a lighter reached by passing from a rear hatch of a ship through a porthole in the side, went from the hatch to the fore part of the ship, and left his coat, which could have been left at some other place more convenient to his place of employment. In the evening he got his coat, and, when attempting to reach said rear hatch, he fell into an unguarded hatchway lying entirely outside of the direct line between the rear hatch and said porthole: Held, that his employer was not liable, as his duties did not require him to be where he was injured. —KENNEDY v. CHASE, Cal., 52 Pac. Rep. 83.

82. MECHANIC'S LIEN — Statement of Claims.—Pub. Acts 1891, No. 179, § 1, providing for the serving by subcontractors, on the owners of the premises built on, of detailed statements of their claims within 10 days after material furnished, is for the protection of the subcontractor, and is not a condition to his lien attaching. —BLITZ v. FIELDS, Mich., 74 N. W. Rep. 186.

83. MINES AND MINERALS — Petroleum — Nature of Property.—Petroleum oil is a mineral, and while it is in the earth it forms a part of the realty, and when it reaches a well, and is produced on the surface, it becomes personal property, and belongs to the owner of the well.—KELLY v. OHIO OIL CO., Ohio, 49 N. E. Rep. 399.

84. MORTGAGES—Foreclosure—Redemption. — Where the mortgagee bids in the mortgaged property at foreclosure, but gives an opportunity for redemption, and appears to have been willing to allow such redemption, but the mortgagor abandons the attempt to redeem, the court will not thereafter order a resale unless the mortgagee conveys under the direction of the mortgagor.—STEBBINS V. HEATH, Mich., 74 N. W. Rep. 265.

85. MORTGAGE—Foreclosure Sale.—A deed of trust to secure a note providing that the sale of the premises thereunder should be made at the court house in a certain county will not support a sale thereof made at the court house in a different county.—BEITEL V. DOBBIN, Tex., 44 S. W. Rep. 299.

86. MORTGAGE—Quitclaim Deed—Merger.—After a decree for the foreclosure of a mortgage was entered, the mortgagor's heirs executed a quitclaim deed to the mortgagee, with the understanding that he would deed the property back if the decree was paid or secured within a year, which was not done, and he took possession, and thereafter the administrator *de bonis non* of the mortgagor recovered of the mortgagee certain payments of interest on the decree that had been made by the mortgagor's executor: Held, that the acceptance of the quitclaim deed did not prevent the mortgagee from selling under the decree, and claiming a deficiency against the mortgagor's estate.—QUICK V. RAYMOND, Mich., 74 N. W. Rep. 189.

87. MORTGAGE FORECLOSURE—Junior Mortgagee—Estoppel.—Bill in equity by a junior mortgagee for an accounting from a bank, an elder mortgagee, for surplus proceeds of a foreclosure sale by the bank. At the sale the bank's special agent, authorized to bid a sum sufficient to cover the elder mortgage, by mistake exceeded his authority, and bid a larger sum: Held, that the bank was not estopped to set up the mistake and lack of authority, or to deny its receipt of the sum bid.—WHITNEY V. NAT. EXCH. BANK OF NEWPORT, U. S. C. C., D. (R. I.), 84 Fed. Rep. 377.

88. MORTGAGE FORECLOSURE—Validity of Mortgage.—After a mortgage to a foreign corporation has become an executed contract, by foreclosure, it cannot be attacked as void by the mortgagor, in an action for possession brought by the purchaser at foreclosure, on the ground that the mortgagee had not complied with Const. art. 14, § 4, and Sess. Acts 1886-87, p. 102, providing that foreign corporations are not authorized to do business in the State until they have designated a place of business and an agent therein.—DIEFENBACH V. VAUGHAN, Ala., 23 South. Rep. 88.

89. MUNICIPAL CORPORATIONS—Boards of Health—Nuisance.—Sand. & H. Dig. § 5132, gives municipal corporations power to prevent injury or annoyance within corporate limits from anything dangerous, offensive or unhealthy, and to cause any nuisance to be abated within the jurisdiction of the board of health. Section 5303 gives the city council power to establish a board of health, and to give its powers and impose duties on it necessary to secure the city from contagious, malignant and infectious diseases, to provide for its organization, and by-laws for the prompt performance of its duties, and lawful exercise of its powers: Held, that the city council has authority to confer power on the board of health to abate nuisances dangerous to health.—GAINES V. WATERS, Ark., 44 S. W. Rep. 353.

90. MUNICIPAL CORPORATIONS—Liabilities.—Pub. Acts 1887, No. 264, fixing the liabilities of cities for injuries to persons and property on the public highway, is not applicable to injuries to abutting land from the condition of the highway.—TATMAN V. CITY OF BENTON HARBOR, Mich., 74 N. W. Rep. 187.

91. MUNICIPAL CORPORATIONS — Ordinances.—A suit in *quo warranto* against a city and its council for the purpose of testing the power of a city, by its council, to adopt a certain ordinance, and simply asking that the city be ousted from the power, by its council, to adopt such an ordinance, cannot, under our system and practice, be maintained. The remedy in such case is to enjoin any steps that may be taken to enforce the ordinance, or to proceed in *quo warranto* against any person or persons who may claim to hold an office under and by virtue of the provisions of the ordinance claimed to be invalid.—STATE V. CITY OF NEWARK, Ohio, 49 N. E. Rep. 407.

92. MUNICIPAL CORPORATIONS — Streets — Paving. — Where a city is authorized to repair its streets, and, if so declared by ordinance, assess the cost against the adjacent property, the repairs contemplated are those whose present necessity exists in the consideration of the council, and the council cannot insert in a contract for street paving, to be paid for by special assessment, a provision requiring the contractor to keep the street in repair for five years.—CITY OF PORTLAND V. BITUMINOUS PAVING & IMPROVEMENT CO., Oreg., 52 Pac. Rep. 28.

93. OFFICE AND OFFICERS—Public Office.—To constitute a public office, against the incumbent of which *quo warranto* will lie, it is essential that certain independent public duties, a part of the sovereignty of the State, should be appointed to it by law, to be exercised by the incumbent in virtue of his election or appointment to the office thus created and defined, and not as a mere employee, subject to the direction and control of some one else.—STATE V. JENNINGS, Ohio, 49 N. E. Rep. 404.

94. PARTNERSHIP—Note of Firm—Individual Debts.—A promissory note executed in the name of a mercantile firm by one of its members to pay his individual debt, and accepted by the payee with knowledge of the facts, is not the contract of the firm, and it is not primarily liable therefor. Such contract, however, when ratified and adopted by the other members, becomes, *inter partes*, a valid debt against the firm.—MCRAE V. CAMPBELL, Ga., 28 S. E. Rep. 920.

95. PLEADING—Waiver of Objections.—Under Hill's Ann. Laws, § 71, providing that objections to a complaint not taken by demurrer or answer are deemed waived, except objections to the jurisdiction, and that the complaint does not state a cause of action, an objection that the complaint does not state a cause of action may be urged for the first time on a writ to review a judgment thereon, although defendant made no appearance in the lower court.—WILLITS V. WALTER, Oreg., 52 Pac. Rep. 24.

96. PLEADING AND PROOF—Variance.—A complaint by a bank for overdraft, though counting only on checks of defendant's agent H, but which refers to all checks by check number and date of payment, allows of proof of checks signed by R, an assistant of H, who had been authorized by defendant and H, as the latter had told plaintiff, to sign checks in his absence.—WHEATLEY V. KUTZ, Ind., 49 N. E. Rep. 391.

97. PRINCIPAL AND AGENT—Bills and Notes.—A principal who retains a note obtained by its agent's fraudulent representations, is bound thereby although unauthorized and unknown.—AMERICAN NAT. BANK OF AUSTIN V. CRUGER, Tex., 44 S. W. Rep. 278.

98. PROHIBITION—Act Already Performed.—The writ of prohibition, as its name imports, is one which commands the person to whom it is directed not to do something which, by the suggestion of the relator, the court is informed he is about to do. If the thing be already done, it is manifest that the writ cannot undo it, for that would require the performance of an affirmative act; whereas, the only effect of the writ of prohition is to suspend all action, and prevent further proceeding in the prohibited direction.—STATE V. POTTS, La., 23 South. Rep. 97.

99. QUIETING TITLE — Presumptions. — When complainant's ancestor purchased and obtained possession of the lands, the legal title being in one P, who paid no consideration therefor, a court of equity will, after 30 years, if necessary to sustain complainant's title, presume that P conveyed the lands to the ancestor.—CLEMMONS V. COX, Ala., 23 South. Rep. 79.

100. RAILROAD COMPANY—Cattle Guards—Damages.—Gen. St. 1889, par. 1259, imposes the duty upon a rail-

road company to build cattle guards where necessary whenever its line of railroad passes through a fenced field, whether such field is inclosed before or after such railroad is constructed.—ATCHISON, T. & S. F. R. Co. v. BILLINGS, Kan., 52 Pac. Rep. 61.

101. RAILROAD COMPANY—Failure to Maintain Fences.—The liability of a railroad company, under Burns' Rev. St. 1894, § 5323 (Horner's Rev. St. 1897, § 4098a), requiring railroad companies to maintain fences along their railroad tracks, and providing that companies failing to comply therewith shall be liable for all damages done to stock, does not extend to the killing of a child, caused by its wandering on the track by reason of the fence being torn down.—BALTIMORE & O. S. W. RY. CO. v. BRADFORD, Ind., 49 N. E. Rep. 388.

102. REAL ESTATE BROKERS—Commission.—When a broker, in whose hands property has been placed to exchange, finds a person who is willing to trade on the first party's proposition, and he brings the parties together, with the result that a trade is made, though on somewhat different terms than in the original proposition, he earns a commission.—KNOWLES v. HARVEY, Colo., 52 Pac. Rep. 46.

103. RECEIVERS—Injunction.—Where, by reason of dissensions among the directors of a trading corporation, there is a deadlock in the management of its business by them, a receiver *pendente lite*, should be appointed.—STERNBERG v. WOLFF, N. J., 39 Atl. Rep. 397.

104. REPLEVIN—Verdict and Judgment.—Where plaintiff in replevin of several articles does not allege that they have a special value to him, and shows that he is the owner of the property, and entitled to its possession, it is not necessary that the judgment fix the value of each article separately.—BYRNE v. LYNN, Tex., 44 S. W. Rep. 311.

105. REMOVAL OF CAUSES—Citizenship—Alienage.—Where a petition for the removal of a cause from a State court to a federal court on the ground of diversity of citizenship is presented by only one of two defendants who are sued jointly on a single cause of action, it should not be allowed, unless the case presents a separable controversy, and not then where the sole petitioner is an alien.—GUARANTEE CO. OF NORTH AMERICA v. FIRST NAT. BANK OF LYNCHBURG, Va., 28 S. E. Rep. 909.

106. SALE OF GOODS—False Representations as to Credit.—Where an insolvent obtained goods on credit through false representations, and conveyed his entire stock to a trustee for the benefit of certain alleged creditors, the sellers, who, on discovery of such condition, disaffirmed their sale, demanded the return of their goods, and offered to restore such portion of the purchase price as had been paid, could not hold such preferred creditors liable for the conversion of such goods, on the theory that such trustee was the agent of such creditors, and that they were responsible for his acts in refusing such demand, and disposing of the goods in question for their benefit.—BLALOCK v. JOSEPH BOWLING CO., Tex., 44 S. W. Rep. 305.

107. TAXATION—Exemptions—Camp-meeting Property.—Where an association organized and conducted for the purpose of a purely public charity, as a camp meeting, under the supervision and control of some church, owns real estate devoted exclusively to the same use, and thereon provides privileges for the comfort and convenience of those who may attend the meeting, the fact that it makes charges for the use of these privileges does not subject its property, nor the privileges so provided, to taxation, under the laws of this State.—DAVIS v. CINCINNATI CAMP-MEETING ASSN., Ohio, 49 N. E. Rep. 401.

108. TAXATION—Special Assessments.—A tax collector, under Const. art. 11, § 16, should pay into the city and county treasury money paid for taxes under protest, though the taxpayer notified him not to make such payment, and that he intended to institute an action against him to recover the taxes; and he is not liable to such taxpayer for making such payment.—PHELAN v. CITY AND COUNTY OF SAN FRANCISCO, Cal., 52 Pac. Rep. 38.

109. TAXATION OF TOWNS—Constitutional Law.—The people of a town lying within the corporate limits of a city, by adopting the township organization, constituted the county board corporate authorities for the town, and thereby empowered them to determine the amount necessary to be raised for town expenses, under Rev. St. 1874, ch. 139, art. 4, § 4, which provides that in such towns all moneys necessary to be raised for town expenses shall be ascertained by the county board, and the county clerk shall extend the amount so ascertained.—PEOPLE v. KNOPE, Ill., 49 N. E. Rep. 424.

110. TELEGRAPH COMPANY—Non-delivery—Pleading.—It is error to charge that if the addressee of a telegram was absent from his place of residence, but his wife was there, a delivery to her there would have been a delivery to him; the company's duty to the addressee being personal, and the wife not being, as such, the general agent of the husband.—WESTERN UNION TEL. CO. v. MITCHELL, Tex., 44 S. W. Rep. 274.

111. TRESPASS—Pleading.—As a person, having a right to enter on his own land, cannot be guilty of a trespass thereon, whether he enters with or without the consent of another, the plea of *liberum tenementum* is available in an action of trespass *quare clausum fregit*.—STILLWELL v. DUNCAN, Ky., 44 S. W. Rep. 357.

112. TRUSTS—Parties—Collateral Attack.—A divorced wife, who has been awarded money as permanent alimony, and in lieu of dower, has no interest in property held in trust for the husband, so as to require notice to her of proceedings to execute the trust.—CODY v. CODY, Wis., 74 N. W. Rep. 217.

113. TRUST DEED—Successor of Trustee.—Change of domicile, not temporary absence, is meant by "removal" in a deed of trust, providing, in the event of the trustee's death, resignation, removal from the county, or failure or inability to act, for vesting of his title and authority in a successor.—BARSTOW v. STONE, Colo., 52 Pac. Rep. 48.

114. VENDOR'S LIEN—Extension.—A vendor's right to extend the time of payment of his lien is not affected by the fact that some one had purchased a portion of the land of the vendee, where said vendor had no knowledge of such purchase.—CHATTANOOGA FOUNDRY & PIPE WORKS v. HEMBREE, Ala., 23 South. Rep. 38.

115. VENDOR AND PURCHASER—Exchange of Property.—Plaintiff conveyed certain land to defendant, and received in consideration therefor a conveyance from defendants of certain other land and $25 in money. The conveyances were by separate instruments, in the ordinary form, and the word "exchange" was not used in either of them: Held, that the transaction was not a common-law exchange of lands, entitling either party to rescind on failure of title to the land conveyed to him.—WINDSOR v. COLLINSON, Oreg., 52 Pac. Rep. 26.

116. VENDOR AND PURCHASER—Notice of Outstanding Title.—The rule of law which declares that a purchaser of real estate in possession of another than his grantor is chargeable with knowledge of all the rights of such party in possession has its exceptions. It does not apply where the possession of such party is entirely consistent with the record title, nor where such party was a former vendor of the land, and remained in possession; and when such party in possession holds a lease of the land, and the purchaser knows of the existence of such lease, he may attribute the possession to such lease.—RED RIVER VALLEY LAND & INVESTMENT CO. v. SMITH, N. Dak., 74 N. W. Rep. 194.

117. WITNESSES—Competency—Executors.—The probate of a will is not an action by or against the executor, within Rev. Code, p. 798, ch. 537, § 1, forbidding a party to testify, in an action by or against an executor, as to transactions with or statements by testator.—IN RE SPIEGELHALTER'S WILL, Del., 39 Atl. Rep. 465.